BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAUL GOMEZ-CHAVARRIA Claimant	)	
VS.	)	Docket No. 1,031,604
CARGILL MEAT SOLUTIONS Self-Insured Respondent	)	

ORDER

Claimant requested review of the June 19, 2009 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on October 21, 2009.

APPEARANCES

Conn Felix Sanchez, of Kansas City, Kansas, appeared for the claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ adopted the impairment opinion offered by Dr. Carabetta (the physician she appointed to conduct an independent medical examination) and awarded claimant a 19 percent permanent partial impairment to the right upper extremity and a 15 percent permanent partial impairment to the left upper extremity, both at the level of the shoulder. The ALJ went on to assess the costs of certain depositions to the claimant as she concluded they were not necessary and irrelevant to any of the disputed issues. She also sustained respondent's objections to Dr. Munhall's report, and any opinions contained therein were excluded from consideration based upon K.S.A. 44-510h(b)(2).

Claimant appealed the Award and contends it should be reversed and/or modified in several respects. First, claimant argues that the ALJ erred in excluding Dr. Munhall's report and his deposition testimony simply because respondent alleges it paid $300 in unauthorized medical expenses related to his services in this matter. Claimant maintains Dr. Munhall's report did not violate K.S.A. 44-510h(b)(2) and should not have been excluded. Second, claimant contends the ALJ erred in adopting Dr. Carabetta's opinions regarding his permanent impairment. Claimant contends the Award should be modified to reflect the 24 percent to the left shoulder and 39 percent to the right shoulder as assigned by Dr. Munhall. Third, claimant asserts that the ALJ abused her discretion in assessing the costs of certain depositions against claimant. Claimant believes the depositions were necessary due to the uncertain nature of the law as it related to bilateral injuries and accordingly, respondent should be made to pay the costs of all the depositions taken in this matter.

Respondent contends the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable accident to both of his wrists and shoulders as a result of his repetitive work duties. He had conservative treatment to both shoulders and wrists and even had surgery to his right shoulder. But his recovery was, in his view, less than optimum and so he declined any further surgical interventions.

Claimant sought out Dr. Michael H. Munhall for an evaluation in November 2006, in the hopes of obtaining additional treatment recommendations. Dr. Munhall concluded that claimant required additional conservative treatment. Thereafter, the parties agreed that claimant would undergo an independent medical examination by Dr. Terrance Pratt on April 3, 2007. Dr. Pratt examined claimant, taking a history and reviewing claimant's medical records and ultimately made some treatment recommendations.

On April 23, 2007, claimant was terminated from his job with respondent purportedly for falsification of his employment records. It appears that claimant disclosed a work-related accident to Dr. Pratt during the course of his evaluation, an accident respondent asserts was not disclosed on his employment application. And upon receipt of Dr. Pratt's report, respondent decided to fire claimant for his failure to disclose that accident.

After claimant was terminated from his job, his attorney sought to depose four individuals. The purpose of these depositions was to ascertain the reasons behind claimant's termination. During this same period of time the applicable law in Kansas

changed. On March 23, 2007, the Kansas Supreme Court issued its opinion in *Casco.*[1] Casco altered the analysis applied to cases such as this one. Rather than analyzing claimant's bilateral upper extremity claim as a whole body injury, *which gives rise to the possibility of a work disability claim under K.S.A. 44-510e(a)*, such injuries are considered one of two things: permanent and total disability *or* separately scheduled injuries to be calculated pursuant to the statutory schedule set forth in K.S.A. 44-510d. Thus, the *Casco* ruling effectively meant that claimant was no longer entitled to a work disability and was limited to scheduled injury benefits to each of his upper extremities.[2] Although a Motion for Rehearing or Modification was filed in *Casco*, the Supreme Court denied that request on May 8, 2007. Thus, as of May 8, 2007, the *Casco* mandate was issued and it was clear that bilateral injuries, such as claimant's, were no longer a viable basis for anything other than a permanent total disability or a separately scheduled functional impairment.

Respondent filed a motion to quash claimant's deposition requests and that motion was heard on May 23, 2007. The ALJ was reluctant to limit claimant's discovery and evidence efforts but nonetheless cautioned claimant's counsel:

> I will state that at the end of the case if I find the depositions were frivolous or went on in excess and shouldn't have been I do have the right to assess them to the claimant, and I have been known to do that or if I find that they were obviously taken for some other purpose other than the workers compensation case they can be assessed back to the claimant.[3]

The depositions went forward on June 1, 2007 and distilled to their essence, the entirety of these depositions were focused on the reasons behind claimant's termination. The clear import of claimant's questions during these depositions was aimed at demonstrating respondent's lack of good faith in deciding to fire claimant, thereby creating a wage loss. There was nothing within any of these depositions that shed any light on claimant's impairment or any of the issues that were ultimately litigated at the Regular Hearing.

Claimant continued to receive treatment for his work-related accident and after a prehearing settlement conference, claimant was sent to Dr. Vito J. Carabetta for an independent medical examination pursuant to K.S.A. 44-510e(a). Dr. Carabetta performed his court-ordered examination October 10, 2008, and ultimately concluded that claimant bears a 19 percent permanent impairment to the right upper shoulder and a 15

---

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

[2] Although claimant's injuries give rise to the *presumption* that he was permanently and totally disabled, he has since worked and does not contend he was or is permanently and totally disabled. Rather, he bears separately scheduled impairments to his upper extremities.

[3] Hearing on Motion to Quash Depositions Trans. (May 23, 2007) at 8.

percent permanent impairment at the left shoulder. According to Dr. Carabetta, both of these ratings are rendered consistent with the principles set forth in the 4th edition of the *Guides*[4]. These ratings include 10 percent to each upper extremity for the carpal tunnel complaints with the remaining impairment attributable to each shoulder.[5]

Claimant again sought out Dr. Munhall, although this time it was for purposes of obtaining a permanent impairment rating. Dr. Munhall saw claimant on March 26, 2008 and conducted another examination and reviewed the pertinent medical records. He ultimately issued a rating report, but that report was excluded by the ALJ.

During Dr. Munhall's deposition, respondent's counsel objected to his ultimate impairment opinions citing K.S.A. 44-510h(b)(2). Respondent asserts that it tendered a check to claimant's counsel for $300 on February 21, 2007 for "unauthorized medical" provided by Dr. Munhall. Thus, respondent contended that because it had paid part of the unauthorized medical allowance for services provided by Dr. Munhall, the claimant could not use any impairment opinions expressed by Dr. Munhall. The ALJ concluded that "[b]ased on the statements made [at Dr. Munhall's deposition and at the regular hearing], the objection made by counsel for respondent should be and hereby is sustained."[6]

With this ruling, the only evidence contained within the record was the permanent impairment opinion expressed by Dr. Carabetta. The ALJ adopted that opinion as her own and awarded claimant a 19 percent impairment to the right upper extremity and a 15 percent impairment to the left upper extremity. In addition, the ALJ assessed the costs of four separate depositions against claimant as she concluded that the content of these depositions were irrelevant to the issues.

Claimant appealed the ALJ's Award and seeks both a modification of the ultimate impairment findings as well as a reversal of the ALJ's conclusions with respect to the admissibility of Dr. Munhall's report and the decision to assess the costs of the four depositions against him.

The logical point to begin with is the admissibility of Dr. Munhall's report. Dr. Munhall first saw claimant in November of 2006, for the purposes of making treatment

---

[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[5] For the right shoulder, Dr. Carabetta assigned 10 percent to the shoulder and 10 percent to the right upper extremity for carpal tunnel. When converted and combined this yields a 19 percent to the right upper extremity at the level of the shoulder. For the left, he assigned 5 percent to the shoulder and 10 percent for the carpal tunnel and again, when converted and combined this yields a 15 percent to the shoulder. Carabetta's IME report dated Oct. 10, 2008.

[6] ALJ Award (June 19, 2009) at 3.

recommendations. The Act provides for just such a mechanism and allows the injured employee up to $500 to obtain such evaluations.[7]

This dispute stems from the statutory language that prohibits a claimant from using the unauthorized medical allowance to "purchase" a rating report. The Court of Appeals in *Castro*[8] indicated that the unauthorized medical allowance could be used for an initial examination even if that physician would later tender a rating report. But in *DeGuillen*[9], that rule changed slightly. The *DeGuillen* Court enunciated the following rule:

> We hold that in order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record, upon penalty that the examination expense may not be reimbursed. In order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating may be solicited from that physician either as a part of the initial engagement or thereafter. Although employees are not prohibited from seeking independent advice on work-related injuries and may seek reimbursement for up to $500, the clear intent of the legislature is to prohibit such funds being applied to an improper impairment rating.[10]

Claimant argues that Dr. Munhall's ratings were wrongfully excluded because the statute, K.S.A. 44-510h(b)(2) contemplates a single examination and payment by respondent of the allowance for that single exam. And that when there is a second examination, the rule is not violated.

> The claimant points out that KSA 44-510h(b)(2) is referring only to a single examination. If the legislature wanted to prohibit the claimant from seeking an examination paid with unauthorized [medical] and then return to the same doctor for a second examination paid by the claimant, it would have stated so with specificity by using the plural form and referring to examinations."[11]

The Board disagrees with claimant's argument that the statute contemplates a single evaluation. The statute indicates the employee may consult a health care provider of his or her own choosing "for the purpose of examination, diagnosis or treatment..."[12] If,

---

[7] K.S.A. 44-510h(b)(2).

[8] *Castro v. IBP, Inc.*, 29 Kan. App. 2d 475, 30 P.3d 1033 (2001).

[9] *DeGuillen v. Schwan's Food Mfg., Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007).

[10] *Id.* at 756.

[11] Claimant's Brief at 4-5 (filed Aug. 17, 2009).

[12] K.S.A. 44-510h(b)(2).

as claimant argues, a single evaluation was intended, then the statute would reference "*an* examination...". The plain language of the statute provides for a total of $500 in unauthorized medical, to be used all at once or for multiple medical providers. But none of the $500 can be used towards any sort of a report which speaks to the ultimate issue of impairment.

The Board is mindful of the language contained within *DeGuillen* which suggests that once a claimant consults with a physician under the financial umbrella of the unauthorized medical allowance, claimant is forever prohibited from seeking further opinions from that physician with respect to his or her final impairment ratings. However, the Court of Appeals' opinion seems to add more than what the statute itself provides. The statute indicates that the physician's evaluation which leads to a rating is not to be paid for with the $500 unauthorized medical allowance. Simply put, respondent shall not be compelled to pay for an impairment rating claimant requests from a physician claimant seeks out. The statute does not say, as *DeGuillen* intimates, that thereafter the physician may forever only be consulted and compensated as an unauthorized medical provider and is precluded from issuing admissible impairment opinions. Such an interpretation is inconsistent with the concept that statutes are to be interpreted using the express language contained within the statute itself, not with an eye to what the Court wants the law to be. "When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be."[13]

Here, claimant sought a second opinion from Dr. Munhall in November 2006, during the course of his treatment. Dr. Munhall made treatment recommendations but issued no impairment ratings at that time. On March 26, 2008, he saw claimant again. From all indications, he conducted a new examination and thereafter issued a report which contained his permanent impairment opinions. There is no indication in the record that respondent paid for this second visit in March 2008, nor for Dr. Munhall's subsequent report. The Board finds that Dr. Munhall's report and his impairment opinions should not have been excluded from consideration under K.S.A. 44-510h(b)(2). Accordingly, that portion of the ALJ's Award is reversed.

Turning now to the nature and extent of claimant's impairment, the ALJ adopted the opinions expressed by Dr. Carabetta as that was the only evidence contained within the record. Even when Dr. Munhall's opinions are considered, the Board finds it is more persuaded by the opinions of Dr. Carabetta. Thus, the ALJ's Award of 19 percent impairment to the right upper extremity and 15 percent impairment to the left upper extremity, both at the shoulder level, are affirmed.

---

[13] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

Although claimant argues in his brief that the ALJ erred in finding a preexisting functional impairment[14], there is no indication within the Award that the ALJ made any such finding, nor is there anything within Dr. Carabetta's testimony or his report that suggests that any deduction was made for a preexisting impairment. At oral argument, respondent confirmed that it was not requesting any credit for a preexisting impairment. Thus, the Board is at a loss to understand this contention.

Finally, as for the assessment of costs for the depositions of four of respondent's employees, the Board has reviewed the record in its entirety and the Board affirms the ALJ's decision on this issue. Claimant seems to suggest that the law was in flux at the time of his termination and that it was necessary to preserve the witnesses' testimony on the reasons surrounding his firing. This argument is unpersuasive if not wholly inaccurate. *Casco* was initially issued on March 23, 2007. And while the *Casco* holding most certainly altered long-held beliefs with respect to the legal analysis used in bilateral injury claims, by May 8, 2007 all uncertainty that might have remained was gone. Claimant's legal argument that respondent acted in bad faith, causing claimant's wage loss (an essential component of work disability) was no longer viable. This rendered those four depositions irrelevant and unnecessary. Claimant's counsel had over two months to digest the meaning of *Casco* and its impact on this case before proceeding with the depositions. There is nothing within those depositions that shed any light on the issues in this case. The ALJ was justified in assigning the costs to claimant and the Board finds no reason to disturb this finding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 19, 2009, is affirmed in part and reversed in part.

[14] Claimant's Brief at 5 (filed Aug. 17, 2009).

IT IS SO ORDERED.

Dated this _____ day of November 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge